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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. ~~265~~ 27

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

vs.

THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANTS

ARTHUR B. LAFRANCE, Esq.
New Haven Legal Assistance Association
Mailing Address:
College of Law
Arizona State University
Tempe, Arizona 85281

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 265

GLADYS BODDIE, BERTHA BARKER, ANN DE NICOLA, MARYANN DOZIER, BETTY ANN PEREZ, MARY WIERZBICKI, MAMIE WILLIAMS, MARY YEATON, and all other persons similarly situated,

Appellants,

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THE STATE OF CONNECTICUT; EDWARD HORWITZ, Clerk of the Superior Court of Connecticut for New Haven County; JUDGE JOSEPH S. LONGO, Superior Court of Connecticut; JUSTICE JOHN P. COTTER, Court Administrator, Supreme Court of Connecticut,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF APPELLANTS

Opinion Below

The opinion of the United States District Court for the District of Connecticut is reported as *Boddie* v. *State of Connecticut*, 286 F. Supp. 968 (D. Conn. 1968).

Jurisdiction of This Court

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1253, which authorizes a direct appeal from a judgment by a three judge district court denying an injunction. The Court below consisted of three judges, convened pursuant to 28 U.S.C. § 2281 et seq., which refused to grant an injunction against Appellees. By their complaint, Appellants sought to enjoin Appellees from enforcing a Connecticut statute on the ground that such enforcement violated the equal protection and due process guarantees of the Fourteenth Amendment to the United States Constitution. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1343(c), 2201, 2202 and 42 U.S.C. §§ 1981, 1983 and 1988.

The District Court judgment was entered on July 17, 1968. Appellants' Notice of Appeal was filed September 11, 1968. The case was docketed in this Supreme Court at Misc. 1131 on November 12, 1968, at which time a Jurisdictional Statement was filed. Probable jurisdiction was noted on June 23, 1969, at which time permission was given to proceed *in forma pauperis*.

Provisions of the United States Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statute Involved

The state statute, the constitutionality of which is challenged, is Conn. Gen. Stat. § 52-259, as modified by Public Act 628 of the 1967 Legislature, providing in pertinent part that:

> There shall be paid to the clerks of the supreme court of errors or the superior court, for entering each civil case, twenty-two dollars. . . . and, for recording each judgment, the following amounts: . . . (4) divorce judgments, whether for the plaintiff or the defendant, not including judgments annulling a marriage, fifty dollars, to be charged in all cases against the plaintiff except when the defendant prevails on a cross-complaint, in which case the fee shall be charged against the defendant. . . .

Public Act 628 provides, in part, that:

> There shall be paid to the clerks of the supreme court or the superior court, for entering each civil cause, forty-five dollars . . . .

Question Presented

Did the State of Connecticut, by requiring these indigent Appellants to pay filing fees and service of process as a condition precedent to initiating divorce suits and thereby preventing them from bringing such suits, violate their rights to petition for redress of grievances, due process and equal protection of the laws?

Statement of the Case

Gladys Boddie and seven other Appellants seek to divorce their husbands.* But filing an action in Connecticut costs forty-five dollars and service of process by sheriff increases the expense to approximately sixty dollars. Newspaper publication, where necessary, may increase the total expense to over one hundred dollars.

The Appellants cannot afford to pay these expenses. They submitted financial affidavits in support of their applications to the Superior Court for New Haven, Connecticut. Those affidavits were attached to the complaint in the instant proceeding in the Court below. In summary (see A. 11-28):

1. each Appellant is a welfare recipient, but receives no welfare assistance for legal expenses;
2. the incomes of the Appellants range from $66.00 to $370.86 per month;

* The decision below was based on Appellees' motion to dismiss. No evidence was taken. This Statement, therefore, is based on Appellants' Complaint, the allegations of which were accepted as true on the Motion To Dismiss. See Opinion below at 286 F. Supp. 972. Appellants' Complaint appears at A. 8-10.

3. the maximum number of dependents supported by each Appellant is six, in addition to herself;

4. the personal assets of Appellants range from $100 to $600 in estimated value; and

5. none of the Appellants has any assets from which to pay legal expenses.

If Appellants are required to pay the legal expenses of a divorce, they will be effectively barred from the Courts of Connecticut (A. 42).

On March 13, 1968, Appellants filed an application, accompanied by financial affidavits and appropriate divorce papers, asking the Superior Court for New Haven County to waive filing fees and effect service of process. On March 14, the clerk returned all the papers, declining to file them without payment of fees. On April 2, 1968, Superior Court Judge Joseph S. Longo, sitting on the Family Relations session, declined to hear the motion to waive costs and effect service of process, on the ground that he had no statutory authority to grant the relief sought. The Court Administrator for Connecticut, Supreme Court Justice John P. Cotter, took the same position on the same date.

This effectively precluded state relief. A civil rights action was then brought in the United States District Court for the District of Connecticut. Appellants sought both declaratory and injunctive relief, claiming that Connecticut had violated Appellants' constitutional rights by barring them from its courts solely on the basis of poverty. The prayer for relief asked the District Court to order Appellees to accept the divorce papers without payment of

filing fees and to effect service of process. Appellees moved to dismiss.

A three judge court granted Appellees' motion on July 17, 1968 and this appeal was taken.

Summary of Argument

Court costs for a divorce in Connecticut usually total about sixty dollars, but may be much higher. Appellants are all receiving welfare assistance, which does not provide for legal expenses, and they cannot pay for the divorce they seek. Consequently, they have been barred from the courts of Connecticut.

The State has thus denied equal protection of the laws. It is extending benefits to those who can pay court costs, but withholding these benefits from the poor. Clearly such an approach could not be applied to a person appealing from a criminal conviction or seeking to vote. Yet equally important rights, involving fundamental aspects of marriage and family, have been denied Appellants because of their poverty.

The State has also denied due process of laws. The Fourteenth Amendment, in guaranteeing due process to all, incorporates the right to petition for redress of grievances. This right has been rendered a nullity by Connecticut's discrimination against Appellants. Although others are free to petition for divorce, Appellants are barred solely on economic grounds.

There can be no justification for this violation of fundamental constitutional principles. By barring only the poor from its courts, Connecticut does not preclude frivolous

litigation. Or, if it does, at the same time it is permitting such litigation by the wealthy. Nor are Court fees and expenses a major source of economic support for the state courts, which are primarily supported by general taxation. In any event, requiring fees of the poor, who cannot pay them, is hardly calculated to generate revenue.

Finally, the fee requirement is not designed to discourage divorce or protect the family unit. The fee requirement applies to all litigation, regardless of its subject matter. And there is substantial evidence that withholding divorces may be more destructive of the family unit in many instances than the granting of divorce.

Plaintiffs should be allowed to pursue their divorce actions without payment of fees or service expenses. To imprison them in ruined marriage, to bar them from seeking new marriages, to make illegal any future procreation on their part simply because they are poor, would be a gross denial of the equal protection and due process of laws guaranteed by the United States Constitution. The poor are not second class citizens.

ARGUMENT

I.

The Court Costs of a Divorce Proceeding in Connecticut Are a Substantial Barrier to Litigation.

Connecticut divorce proceedings are initiated by writ, summons and complaint. The initial pleading must be served by a sheriff and then "returned" to (i.e., filed in) court. If personal or abode service is impossible, service by publication is necessary. See generally Stephenson, *Connecticut Civil Procedure,* with particular reference to §§ 174 et seq.

The sheriff's service fee varies, depending upon the difficulty of locating the defendant. Experience indicates that service usually costs a minimum of ten to fifteen dollars. Publication, of course, is more expensive, rising as high as one hundred dollars in Hartford and one hundred fifty dollars in New York City. See *Public Provision for Costs and Expenses of Civil Litigation,* American Bar Foundation (1966), p. 45.

The filing or "entry" fee in Superior Court is forty-five dollars, and is prescribed by statute. Conn. Gen. Stat. § 52-259, as modified by P.A. 628 of the 1967 Legislature.

Thus, the normal cost for beginning a divorce action is a minimum of sixty dollars. That amount constitutes a substantial burden for people of limited income, people who might be characterized as "poor" or "indigent." For such people, the requirement of paying court fees may effectively bar them from the courts.

II.

These Indigent Appellants Are Barred From Connecticut Courts by Their Inability to Pay Court Costs.

It seems clear that these Appellants are indigent. The Connecticut Welfare Department has so determined in extending minimal assistance, which does not embrace legal fees. Both this Court and the District Court reached a similar conclusion by ordering that this proceeding may be *in forma pauperis*.

The meaning of "indigency" has been stated as follows in Sokol, *Handbook of Federal Habeas Corpus* § 27, p. 145:

> "The dictionary defines indigent as 'poor; needy; destitute; in poverty.' A more useful definition was given by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice:
>
> > '. . . poverty must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means. A problem of poverty arises for the system of criminal justice when at any stage of the proceedings lack of means in the accused substantially inhibits or prevents the proper assertion of a right or a claim of right.' "

This definition would appear to be a very sensible one. This Supreme Court stated in *Adkins* v. *DuPont*, 335 U.S. 331, 339 (1948) that:

> "We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states

> that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.' To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges."

The Court went on to say:

> "The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution."

These general principles are relevant here. But equally relevant is the definition to be found in the financial eligibility standards of the many legal services programs in this country. These programs must deal realistically with the dollars and cents meaning of indigency in a legal setting. They thus make concrete guidelines of abstract principles.

These guidelines are collected and discussed in *Final Report: Eligibility for Free Legal Services,* American Bar Foundation (August 1966). The following excerpts are of significance here:

"Examination of eligibility standards of about 200 civil legal aid organizations reveals very wide disparities in the standards from one organization to another . . . For a single person with no dependents, the figures range from a low of $75 a month in Edinburg, Texas, to a high of $325 in Bay Shore, Long Island, N.Y. For a married couple with no children the range is from $87 a month in Memphis to $350 in Wheaton, Illinois. The increment allowed for the spouse varies greatly from one city to another, whether expressed as an absolute amount or as a percentage of the allowance for a single person. Further, most cities allow additional income if there are dependent children, while a few apparently do not." (at pp. 9-10)

• • • • •

". . . for legal aid organizations serving a population over 1,000,000, the range of net income allowed for a single person was from $29 a week in Atlanta to $60 in Jamaica, N.Y., with a median of $40. The Chicago test was $25 plus amount of rent paid if unemployed, or $34 plus rent if employed. The annual income allowed, as shown in Table 2, ranged from $1500 to $3100, with a median of $2090. This figure may be compared with the amount of $1540 annual income (based on 1962 prices) suggested by Mollie Orshansky as the property line for a person living alone. ('Counting the Poor: Another Look at the Poverty Profile,' *Social Security Bulletin*, Jan. 1965, reprinted in Ferman, Kornbluh & Haber, *Poverty in America* (1965).) In 1962, 45% of such 'unrelated individuals,' or 5 million persons, had incomes below $1500. (House

Committee on Education and Labor, *Poverty in the United States* 7 (1964).)

"The income tests for single persons in the second category of offices, those serving a population of 600,000 to 1,000,000, range from a low of less than $20 in Memphis to highs of $60 in Hartford and $75 in Bay Shore, N.Y. The median is $36, somewhat below the median of $40 for cities of over 1,000,000 population.

"In the third group, cities of 300,000 to 600,000, two of the nineteen offices have income tests of $25 a week or less, which is only $1250 a year. The median is $36 a week or $1885 a year.

"For the fourth group, with a population of 100,000 to 300,000, the figures are comparable to the third group. Again 6 out of 52 offices reported income tests of $25 or less, and the median was $35. For annual income 23 offices reported $1560 or less, the two lowest being $924 and $950. The median was $1800. A fifth group, cities of less than 100,000, included only nine offices. The range of maximum net income rules was extremely wide, from $21 to $58 a week for a single person, and from $41 to $77 for a couple with two children.

"These eligibility requirements may be compared with standard estimates of the minimum level of income currently required for decent subsistence. For a nonfarm family of four, a recent publication of the Social Security Administration has stated that a 'low-cost' budget would require $3955 a year at 1962 prices, and an 'economy plan' budget would require $3165. On the basis of these figures the House Committee on Educa-

tion and Labor concluded: 'Obviously it does not exaggerate the problem of poverty to regard $3000 as the boundary.' (Ibid.) Orshansky uses a figure of $3130." (at pp. 11-12)

The *Final Report* goes on to quote (at p. 12) as follows from Ferman, Kornbluh & Haber, *Poverty in America* 40-41 (1965):

"The privation of families whose income is below the government's poverty-line may be seen by comparing the economy plan budget with the City Workers' Family Budget (CWFB) calculated by the Bureau of Labor Statistics of the U. S. Department of Labor. The 'modest but adequate' BLS CWFB represents 'an estimate of the total cost of a representative list of goods and services considered necessary by four-person city families . . . to maintain a level of adequate living according to standards prevailing in large cities of the United States.' Based on costs of living in 20 large cities in 1959, the most recent estimates of the BLS found that expenditures for a city worker's family of four would range from $6,567 in Chicago to $5,370 in Houston. Since that time, consumer prices have risen over 7.3 per cent."

One final authority may be noted. Mr. Justice Goldberg noted that $3000 gross income was the level at which poverty was established for a family of four in 1964, some five years ago. At that time, some 10,000,000 Americans could then be characterized as poor. *Equality and Government* 39 N.Y.U.L. Rev. 205 (1964).

By the standards discussed above, Mrs. Boddie and her co-appellants are "poor"; they are "indigent." Requiring payment of legal fees effectively bars them from seeking legal relief from the Courts. And this is true even though the amounts involved are relatively small. Filing fees of twenty dollars, four dollars and one dollar and fifty cents have been held so burdensome as to deny equal protection of the laws: *Burns* v. *Ohio,* 360 U.S. 252 (1959), *Smith* v. *Bennett,* 365 U.S. 708 (1961), and *Harper* v. *Virginia State Bd. of Elections,* 383 U.S. 663 (1966). Clearly, the far more substantial expenses of a divorce proceedings pose a barrier of greater significance than these minimal amounts. And the Court below so found. (286 F. Supp. at 972)

Yet the State of Connecticut declines to waive the requirement that these fees be paid. By imposing this requirement, the State has denied equal protection and due process to these appellants.

III.

Appellants Were Denied Equal Protection of the Laws When They Were Denied Access to the Courts Solely Because of Their Poverty.

A. The Equal Protection Clause Forbids Economic Discrimination in the Extension of Significant Rights.

The Fourteenth Amendment to the United States Constitution requires the States to extend equal protection of the laws to all citizens. In an early and excellent discussion of the equal protection clause, Tussman and tenBroek, *The Equal Protection of the Laws,* 37 Cal. L. Rev. 341 (1949) wrote of the Fourteenth Amendment to the United States Constitution that:

> "We now know that the equal protection clause was designed to impose upon the states a positive duty to supply protection to all persons in the enjoyment of their natural and inalienable rights—especially life, liberty and property—and to do so equally. We also know that the equal protection clause, *the only clause of section one of the Fourteenth Amendment that added new language to the Constitution, was originally regarded as the most basic and sweeping of the three.* . . ." (Emphasis supplied.)

The equal protection clause has been applied to economic discrimination, and its effect has been to render "the mere state of being without funds (as) a neutral fact—constitutionally an irrelevance, like race, creed or color." *Edwards* v. *California,* 314 U.S. 160, 184 (1941). Thus, finan-

cial barriers may not be imposed so as to deny equal protection of fundamental rights, such as the right to vote. *Harper* v. *Virginia State Bd. of Elections* 383 U.S. 663 (1966). An equally significant right is that embodied in access to the courts—the right to petition for redress of grievances: *NAACP* v. *Button,* 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1 (1964). A state may not deny this latter right by imposing financial barriers which exclude indigent litigants. Yet that happened here.

Perhaps the most significant case in this area is *Griffin* v. *Illinois,* 351 U.S. 12 (1956). There, this Court held that a state must provdie an appeal transcript to an indigent prisoner. The opinion said in part (351 U.S. at 16-17):

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of the Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice . . . No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.'"

The Court then said (p. 19):

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."

Mr. Justice Frankfurter, concurring, added the following (351 U.S. at 23-24):

> ". . . when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed.
>
> "To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.' (John Cournos, a Modern Plutarch, p. 27.)
>
> "The State is not free to produce such a squalid discrimination."

Griffin has been followed by a series of decisions which reaffirm and amplify its basic principles. In *Burns* v. *Ohio*, 360 U.S. 252 (1959), an indigent prisoner's appeal papers were returned by a court clerk for failure to pay filing fees. The Court treated this as a final judgment by the State Court and reversed, saying (p. 258):

> "There is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, there-

fore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio.

"The State's action in this case in some ways is more final and disastrous from the defendant's point of view than was the *Griffin* situation. At least in *Griffin,* the defendant might have raised in the Supreme Court any claims that he had that were apparent on the bare record, though trial errors could not be raised. Here, the action of the State was completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."

In a similar case, *Smith* v. *Bennett,* 365 U.S. 708 (1961), this Court held that a state could not bar an indigent prisoner from habeas corpus relief because of his inability to pay filing fees. Again, in *Lane* v. *Brown,* 372 U.S. 477 (1962), a state practice was held invalid because it denied an indigent prisoner the right to a transcript of a writ of error *coram nobis.* And in *Long* v. *District Court of Iowa,* 385 U.S. 192 (1966), it was held that a state must provide a transcript to an indigent prisoner in a habeas corpus proceeding.

The cases discussed above are apposite here. They cannot be distinguished on the basis that they relate only to criminal actions, and not to the civil proceedings proposed by plaintiffs. The equal protection clause, by its terms, does not make such a distinction. Rather, it embraces *all* laws. Further, the cases cited above do not deal with criminal procedure so much as with court procedure—filing fees,

transcripts, appeals, habeas corpus, coram nobis. Indeed, in some of these cases the states themselves argued that the proceedings were civil, yet the Supreme Court still applied the equal protection clause. See, e.g., *Smith* v. *Bennett* and *Long* v. *District Court of Iowa, supra.*

Perhaps another basis for distinguishing the *Griffin* line of cases is that there it was the State which erected the barriers to an individual liberty and that the subject matter, that of criminal misconduct, was peculiarly a matter of State interest. Yet the same characterizations apply to divorce. In *Jeffreys* v. *Jeffreys,* 296 N.Y.S. 2d 74 (Sup. Ct. for Kings County, 1968), the Court allowed a divorce suit without payment of costs. The *Griffin* decision, the Court said, was applicable because (p. 82):

> ". . . An action for divorce is fundamentally different from actions in contract or concerning real property. The latter may be brought or not brought; they may be settled out of court. But our State Constitution (Art. I, §9) mandates that divorces may be granted only by "due judicial proceedings." Furthermore, state statutes dictate who may marry; by whom the marriage may be performed; the obligations of the parties during marriage; the grounds for separation or divorce and the obligations of the parties after the termination of the marriage. For all purposes the State is very much a "partner" to a marriage and a "party" in a matrimonial action.

The court said further (p. 87):

> "Marriage is clearly marked with the public interest. In this State, a marriage cannot be dissolved except

> by "due judicial proceedings" (N.Y. Const. Art. I, § 9). We have erected by statute a money hurdle to such dissolution by requiring in many circumstances the service of a summons by publication. . . . This hurdle is an effective barrier to Mrs. Jeffreys' access to the courts. The loss of access to the courts in an action for divorce is a right of substantial magnitude when only through the courts may redress or relief be obtained. Such a right is, it seems to me, as basic as Griffin's right to appeal and Mrs. Harper's right to vote. It is manifestly discriminatory under *Griffin* standards to deprive Mrs. Jeffreys of that right while affording it to others with money.
>
> I hold that she has been denied the equal protection of the laws guaranteed to her by the State and Federal Constitutions.

An action for divorce is thus unlike most routine civil actions. It is one in which the State has a vital interest and plays a substantial role. The *Griffin* line of cases thus apply and costs should be waived for an indigent litigant.

The position urged here—that the equal protection clause applies in civil cases and requires equal access to the courts for poor and rich alike—was raised in *Williams* v. *Shaffer*, 385 U.S. 1037 (1967). There, the petitioner sought to contest an eviction proceeding. Georgia required posting of security which was beyond the tenant's means and the petitioner was evicted. The petition for certiorari was denied, apparently because of mootness. Mr. Justice Douglas was joined in dissent by Chief Justice Warren and Mr. Justice Brennan:

"The effect of the security statute is to grant an affluent tenant a hearing and to deny an indigent tenant a hearing. The ability to obtain a hearing is thus made to turn upon the tenant's wealth. On numerous occasions this Court has struck down financial limitations on the ability to obtain judicial review. See e.g., *Griffin* v. *Illinois,* 351 U.S. 12, 100 L ed 891, 76 S Ct 585; *Burns* v. *Ohio,* 360 U.S. 252, 3 L ed 2d 1209, 79 S Ct 1164; *Smith* v. *Bennett,* 365 U.S. 708, 6 L ed 2d 39, 81 S Ct 895. We have recognized that the promise of equal justice for all would be an empty phrase for the poor, if the ability to obtain judicial relief were made to turn on the length of a person's purse. It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters. I can see no more justification for denying an indigent a hearing in an eviction proceeding solely because of his poverty than for denying an indigent the right to appeal (*Burns* v. *Ohio, supra*), the right to file a habeas corpus petition (*Smith* v. *Bennett, supra*), or the right to obtain a transcript necessary for appeal (*Griffin* v. *Illinois, supra*)."

The following comments are germane here, in discussing the relevance of the Griffin line of cases to this proceeding:

"The so-called "civil" problems of the poor may involve the defense of a landlord-tenant action for possession. Inability to defend this case for failure to post a bond or to obtain counsel will often result in an eviction

> from the premises—a result which in one sense is more of a deprivation of liberty than a suspended sentence, perhaps even more than incarceration. Imprisonment restrains the individual in his freedom of movement alone; eviction may condemn one to an indeterminate sentence of inadequate housing or no housing at all. This is not to say that the eviction process has no place in the law because of its harshness, any more than the criminal process should be condemned because it results in sending men to jail. But when the procedural fairness of the systems is in issue, it appears incongruous that the indigent tenant may be evicted without an opportunity for an impartial hearing, whereas the financial disabilities of the indigent criminal accused are studiously removed." Willging, *Financial Barriers and the Access of Indigent to the Courts,* 57 Geo. L.J. 253, 270 (Nov. 1968).

Applying the equal protection clause in civil cases to relieve financial barriers to the poor has been urged by many legal scholars. Shortly after the decision in *Griffin* v. *Illinois, supra,* Chief Justice Qua of the Massachusetts Supreme Court noted that *Griffin's* logic compelled waiving civil costs in suits brought by indigents, although he criticized such a result. 25 U. Chi. L. Rev. 143 (1957). In a comprehensive comment, *Discrimination Against the Poor and the Fourteenth Amendment,* 81 Harv. L. Rev. 435 (1967), the following conclusion appears (p. 450-451):

> "Poverty often interferes with the ability of the poor to exercise their legal rights in civil litigation. Court fees or bond requirements can block or limit access to court. Once inside a court the indigent may often be

unable to litigate effectively because he lacks counsel. When judicial remedies are feasible, the courts should intervene to remove these disabilities of property."

Two recent comments go beyond merely urging removal of fee requirements and argue for appointment of counsel in civil cases: *Right to Civil Counsel,* 66 Col. L. Rev. 1323 (1966) and *The Indigent's Right to Counsel in Civil Cases,* 76 Yale L.J. 545 (1967). In the latter, the following observation appears (p. 550):

"The state cannot and need not equalize the impact on rich and poor of all its actions and institutions. But because the establishment of a forum for enforcing claims and vindicating legal rights is so fundamental, the state cannot close that system to any person because of his relative poverty.

"Equal justice, unlike equal privileges on the municipal golf course, is a defining condition of citizenship. The Court has recently recognized that a $1.50 poll tax treats those who cannot pay as second class citizens. A $50 or $100 cover charge at the courthouse bears the same message."

See also: *Litigation Costs: The Hidden Barrier to the Indigent,* 56 Georgetown L.J. 516 (1968).

The simple, elemental fact is that for many of the poor there is now no access to the courts. Financial barriers bar the way. Yet our heritage is that of equal justice, equal protection of the laws, equal access to the courts. The State of Connecticut has denied such equality to these Appellants.

B. The Rights of Divorce, Remarriage and Procreation, All Involved Here, Are Sufficiently Significant to Come Within the Ambit of the Equal Protection Clause.

It is true, of course, that the *Griffin* line of cases involved the personal liberty of men in custody. The appellants here, by contrast, are free. Nevertheless, their liberty is at stake; bondage can exist beyond jail walls, and one of the most oppressive forms is that facing these women. They are bound to marriages in ruins, bound to husbands who have left them, who no longer love or support them, husbands who—it is alleged—have been guilty of intolerable cruelty.

Until this bondage is severed, these Appellants are forbidden by law to pursue happiness with other men or bear other children. Yet these rights of remarriage and procreation, denied here solely because Appellants cannot pay the legal costs of divorce proceedings, are substantial, fundamental rights. This was recognized in *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), where the Court said (p. 541):

> "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race . . . [S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of equal protection of the laws is a pledge of the protection of equal laws."

And in *Loving* v. *Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010 (1967), it was held that the freedom to marry is so fundamental as to be guaranteed by due process of law (p. 1018):

> "These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541, 86 L. Ed. 1655, 1660, 62 S. Ct. 1110 (1942). See also *Maynard* v. *Hill*, 125 U.S. 190, 31 L. Ed. 654, 8 S. Ct. 723 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classification embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State."

See also *Levy* v. *Louisiana*, 391 U.S. 68, 71 (1968) and *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965).

The critical nature of the rights involved here was ignored by the Court below. 286 F. Sup. 973. In this, it erred. The *Griffin* line of cases certainly differs from the instant proceeding. But in one vital respect they are simi-

lar: fundamental rights were denied because of poverty. The Court below missed this essential point.

If the freedom to marry in the first instance cannot be made subject to irrelevant factors, such as race, then the equally important right to remarry cannot be made subject to equally irrelevant factors, such as poverty. A state might perhaps deny to all its citizens the right to remarry. Or it might deny any right to divorce. But it may not extend these rights to some citizens while denying them to others whose sole disqualification is their poverty.

IV.

Appellants Were Denied Due Process of Laws When They Were Denied the Opportunity to Petition for Redress of Grievances.

A. The Right to Petition for Redress of Grievances is an Element of Due Process.

The Fourteenth Amendment to the United States Constitution guarantees that no state shall deny due process of law. The First Amendment to that Constitution protects the right of citizens "to petition the Government for a redress of grievances." The right so to petition is incorporated into the due process clause, and is applied thereby to the States, at least where the petitioning is embodied in litigation affecting liberties of assembly, speech and political expression. *NAACP* v. *Button*, 371 U.S. 415 (1963). But even where political expression is not involved, the right to seek redress in the courts is nevertheless a matter of federal due process. In *Brotherhood af Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964)

and *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426 (1967), attorneys had been retained to render group legal services. Such practices were prohibited by state statute. Although the legal advice and issues were routine and not of constitutional magnitude, this Court held that the due process clause protected such arrangements, since they involved the right to petition the courts for redress.

In the *Mine Workers* case, this Court said (p. 430):

> "We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. 'All these, though not identical, are inseparable.' *Thomas* v. *Collins*, 323 U.S. 516, 530, 89 L. Ed. 430, 440, 65 S. Ct. 315 (1945). See *DeJonge* v. *Oregon*, 299 U.S. 353, 364, 81 L. Ed. 278, 283, 57 S. Ct. 255 (1937). The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil."

This Court has long recognized that:

> "The right to sue and defend in the Courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. *It is one of the highest and most essential privileges of citizenship . . .*"
>
> *Chambers* v. *Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907). (Emphasis supplied.)

These cases are apposite here. The only possible distinction is that they involved groups, whereas this case involves individuals. But the Constitution, by its terms, is not limited to groups. It is equally concerned, perhaps primarily concerned, with individual liberties. The groups in the *Button, Railroad Trainmen* and *Mineworkers* cases had only derivative standing; they were asserting the rights of their individual members to petition for redress. It would be strange indeed to protect the right of a powerful group yet deny such protection to a powerless individual.

True it is that these cases involved the groups' rights to assembly. But this was for the purpose of advancing the members' rights to petition for redress, see, e.g., *NAACP* v. *Alabama*, 357 U.S. 449, 459 (1958), and it was that latter right which was primary. As Professor Corwin has written, *The Constitution of the United States of America, Analysis and Interpretation (1952)*, p. 306:

> "Historically, therefore, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if Amendment I read; 'the right of the people peaceably to assemble' *in order to* 'petition the government.'"

In any event, the present case involves rights as basic as the right to assembly: the rights to marry and procreate, and the right to personal liberty, free from bondage to a meaningless marriage. See, *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) and *Loving* v. *Virginia,* 388 U.S. 1, 18 L. Ed. 2d 1010 (1967).

Appellants reliance on the due process clause may superficially resemble the earlier argument based upon the equal protection clause. But there is a critical distinction. Any argument based upon the equal protection clause must demonstrate that the State is treating its citizens unequally in a significant manner. The present argument, based upon the due process clause, is not so conditioned, because the right to petition for redress of grievances is not only a constitutional right but also a basic mode of political expression. Any infringement of such a right must be considered significant.

Appellants do not contend they have a right to a divorce in the sense that they may have a right to vote or to personal liberty. What they do maintain is that they have a federally protected right to petition the courts for redress of grievances. And denial of that right denies a second federally protected right: due process of the laws.

Appellants maintain further that denial of these rights is of serious consequence. They seek by court action to restructure the marital basis of their lives and the lives of their families. Nothing could be more basic or fundamental. *Loving* v. *Virginia,* 388 U.S. 1 (1967); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942). They can achieve this only by access to the courts. Thus, the right to petition the courts is surely as basic as the right to vote or to enjoy personal liberty.

This argument was totally ignored by the District Court. Nowhere in the Opinion below is the right to petition for redress of grievances mentioned. There is no discussion of the *Button or Mineworkers* cases. Yet this issue was briefed and argued before the lower Court. And it is of manifestly fundamental importance to this case. Appellants repeat here the language quoted above from *Chambers* v. *Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907) that "The right to sue and defend . . . is one of the highest and essential privileges of citizenship."

The decision below denies these privileges to Appellants.

B. The Right of a Poor Person to Petition for Redress of Grievances Without Payment of Court Costs Is Deeply Rooted in the Common Law Which Preceded The United States Constitution's Guarantee of Due Process.

The problem of the poor gaining access to the courts is inextricably interwoven with the question of costs.

> "Costs have existed so long that there is a general disposition to regard them as fundamental, as immutably bound up with our legal institutions. This is a mistake; costs are not established by our constitutions, they are not the product of common law, they exist solely and entirely as creatures of statute." Reginald Heber Smith, *Justice and the Poor,* 20 (1919).

"The early English law had no system of costs. . . ." *Id.* Parties whose claims or defenses turned out to be false were fined, but generally the only costs were those imposed in the discretion of the judge in awarding damages. True,

the early kings could charge for writs, but ". . . it was an accepted maxim that the poor should have their writs for nothing." Smith at 21; Pollock and Maitland, I *History of English Law* 174 (1895).

A cost system was first created by the Statute of Gloucester (6 Edward I, c. 1) (1278). Smith at 21; Maguire, "Poverty and Civil Litigation," 36 Harv. L. Rev. 361, 366 (1923) (hereinafter cited as Maguire). One motivating factor was the need for revenue. Equally important, a cost system carried over the notion that a party who raised a false claim or defense should be fined and that the wrongdoer must pay the costs. Finally, it was thought that a system of costs would serve to deter litigation. Smith at 21.

Poor persons were expressly permitted to litigate without payment of costs by the statute of 11 Henry VII, c. 12 (1495). It provided in part that:

> ". . . (E)very pouer persone or persones which have & hereafter shall have cause of accion or accions ayenst any persone or persones within the realme shall have, by the discrecion of the Chaunceller of this realme, for the tyme being writte or writtes originall and writtes of Sub pena according to the nature of their causes, therefor nothing paieng to youre Highnes for the seales of the same, nor to any persone for the making of the same writte & writtes to be hereafter sued. . . ." Maguire at 373.

The "forma pauperis" procedure, as it is called, is widely believed to have originated in this statute. See for example, Smith at 21. But it appears that 11 Henry merely set forth the procedure as it was then recognized by the

common-law courts. *Brunt* v. *Wardle,* 133 Eng. Rep. R. 1254 (1841), as cited in Comment, *Suits in Forma Pauperis,* 6 Cal. L. Rev. 226 (1918). Chief Justice Tindal and Justice Maule there refer to a case decided some "twenty years before the statute of Henry VII, where a common-law court was using this power (to permit poor persons to sue without payment of costs)." Comment, 6 Cal. L. Rev. at 226. In that case:

> "... one John Brown was present to be the presignator of the poor in the Common Pleas * * * and it was said that if any poor man would swear to him that he was not able to pay for the entry of pleas * * * then he ought to enter the pleas without taking anything for his labor * * * and this was done by the advise of the justices." Y.B. 15 Edw. IV, 26b, as quoted by Maguire at 366.

In any event, the statute of 11 Henry VII and court practice prior to its enactment "... (gave) effect to the spirit of Magna Charta. . . .," Smith at 21-22, which proclaimed: "To no one will we deny, or delay right or justice." Magna Charta, c. 40, as quoted in Silverstein, "Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases," 2 Valp. L. Rev. 21 (1967) (hereinafter cited as Silverstein).

This process of safeguarding the rights of the poor "was carried to its logical completion" by the enactment of 23 Henry VIII, c. 15 (1531), which relieved a poor person who sued and "failed to obtain a verdict or was nonsuited" of the burden of paying costs. Smith at 22; Grinnell, "Have Massachusetts Courts Inherent Common Law

Power to Permit Suits in Forma Pauperis?", 4 Mass. L.Q. 323, 325 (1919).

There remained, however, a fear of vexatious and frivolous suits. Thus, the defeated poor suitor was "subjected to such punishment as the judges deemed reasonable." *Id.*

> ". . . (I)f a pauper abused the proceeding or was nonsuited, he might be taken to the market-place and whipped; but the general spirit of the law was such that when a motion came before Lord Chief Justice Holt to order a nonsuited pauper to be whipped, he denied the motion, observing that there was no officer for the purpose and that he had never known it done." Grinnell at 325-326.

This was the letter and spirit of the law. In actual practice, however, the common-law procedure was severely limited. The statute of 11 Henry VII applied only to plaintiffs and only in the common-law courts. If a man had more than five pounds sterling in hand, he was generally not sufficiently poor. Maguire at 376. For a time court rule required the poor suitor to obtain a lawyer's certificate that he had a good cause of action. Finally, the forma pauperis proceedings were not in fact free.

Individuals seeking to proceed in forma pauperis had to pay "minimum preliminary fees" of six shillings and sixpense. And if he ". . . were admitted and won a verdict of more than five pounds he would have to pay something like four pounds more before receiving a penny on his recovery. . . ." Fees were, in effect, merely deferred for a plaintiff who prevailed. Maguire at 377.

> "The American states carried over into their judicial systems the plan of costs and fees, but many neglected to include the necessary corollary of the proceeding in forma pauperis." Smith, *Justice and the Poor,* at 22.

A substantial number of states did adopt or provide a forma pauperis procedure by statute. See Silverstein at 29-30; and American Bar Foundation, *Public Provision for Costs and Expenses of Civil Litigation,* at 17 (1966).

While the weight of authority appears to be that absent statutory provisions, poor persons may not sue in forma pauperis, see e.g., *Campbell* v. *Chicago & Northwestern Ry.,* 23 Wis. 490 (1868), courts in at least five states (North Carolina, Rhode Island, Texas, Pennsylvania and California) have recognized that a poor person has a right independent of any enabling legislation to so proceed. The decisions reveal two basic approaches: one constitutional, the other historical. On one hand, constitutional provisions have been construed to exempt the poor from costs and fees. *Spaulding* v. *Bainbridge,* 12 R.I. 244 (1879); *Jack* v. *Admrs. of McClure,* 26 Pa. County Ct. 59 (1901); *Willis* v. *Willis,* 20 Pa. Dist. 720 (1911); and *Cunha* v. *Cunha,* 44 D. & C.2d 230 (Pa. 1968). On the other hand, courts have held that the forma pauperis procedure was inherited as part of the common law of the state. *M'Clenahan* v. *Thomas,* 6 N.C. (Murph.) 247, 278 (1813); *Martin* v. *Superior Court,* 176 Cal. 289, 168 Pac. 135 (1917); see also *Hickey* v. *Rhine,* 16 Tex. 577 (1856).

With respect to this latter rationale, the courts have stated either that the English statutes of 11 and 23 Henry are a part of the common law of the state or that the courts at common law had the inherent power to admit poor per-

sons to sue in forma pauperis and that this power was handed down to those state courts which exercise common law jurisdiction.

The "statutory origin" theory is exemplified by the case of *M'Clenahan* v. *Thomas,* 6 N.C. (Murph.) 247 (1813), wherein the court held that the statute of 23 Henry VIII, c. 15 (excusing defeated poor suitors from payment of costs) had been adopted by North Carolina as a part of the common law. *Hickey* v. *Rhine,* a Texas case, is said to illustrate the "inherent power" theory. There the court announced that it had the inherent power to permit:

> ". . . the case to proceed on a satisfactory showing of the inability of the plaintiff to give the security, as no man should be prevented from prosecuting a suit, seeking redress for an outrage upon his person, on the ground of his poverty." 16 Tex. 577, 78-79 (1856).

The inherent power language, however, is dictum, since a contemporaneous Texas statute expressly delineated a forma pauperis procedure applicable to the facts of the case. *Hickey* at 578.

The leading case encompassing both these theories, is *Martin* v. *Superior Court,* 176 Cal. 289, 168 Pac. 135 (1917) (see also *Majors* v. *Superior Court,* 181 Cal. 270, 184 Pac. 18 (1919), a sequel to *Martin*), the first of a line of California cases. There, a day-laborer with a wife and ten children was permitted to bring an action in forma pauperis to recover damages for the wrongful death of his minor daughter.

The court noted that by California statute the common law of England had been adopted ". . . so far as it is not

repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of (California)." Cal. Stats. 1850, c. 95, p. 219; Cal. Pol. Code § 4468 (now Sec. 22.2, Cal. Civil Code). It then proceeded to hold that the term "common law" embraces the English statutes in force at the time the Code section was adopted and which modified the common law, including the statute of 11 Henry VII. *Martin,* 168 Pac. at 136. The court did not stop there, but went on to declare:

> ". . . the power of the English common-law courts to remit fees on petition in forma pauperis did not have its origin in any statute, but was in fact exercised as one of the inherent powers of the courts themselves, quite independently of statute. And this one would naturally expect to find since, imperfect as was the ancient common-law system, harsh as it was in many of its methods and measures, it would strike one with surprise to be credibly informed that the common-law courts of England shut their doors upon all poor suitors who could not pay fees, until Parliament came to their relief. Even greater would be the reproach to the system of jurisprudence of the state of California if it could be truly declared that in this twentieth century, by its Codes and statutes, it had said the same thing. . . . " *Martin,* 168 Pac. at 137.

Since this landmark opinion, the power of the California courts to permit proceedings in forma pauperis has, it appears, been exercised on numerous occasions. Despite language in some of the early cases suggesting a narrow and frugal application of forma pauperis, the California courts have treated the forma pauperis procedure as re-

medial in nature, extending it far beyond its limited common-law scope. Thus, for example, in *Rucker* v. *Superior Court,* 104 Cal. App. 506, 286 Pac. 732 (1930), a defendant was permitted to appeal in forma pauperis. In *Isrin* v. *Superior Court,* 45 Cal. Rptr. 320, 403 P.2d 728 (1965), an earlier ruling, that denied an indigent the right to proceed in forma pauperis where he was represented under a contingent fee contract, on the ground that the attorney had an interest in the litigation and should, therefore, advance the costs, was overturned. And *County of Sutter* v. *Superior Court,* 53 Cal. Rptr. 424 (Dist. Ct. App., 1966), recognizes, as did the United States Supreme Court before it, that the forma pauperis principles applies not just to one who is utterly without funds, but to one who "cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.'" *Adkins* v. *Dupont Co.,* 335 U.S. 331, 339 (1948).

The English common law and American case law are not, of course, uniformly favorable to Appellants' position. Nevertheless there is a substantial body of authority reaching back centuries to the effect that our system of justice must, as a matter of due process, open its doors to the rich and the poor alike. That body of authority is reflected in the Fourteenth Amendment's guarantee of due process and, for that reason, has been reviewed here.

V.

Connecticut's Requirement That These Indigent Appellants Pay Court Costs Which They Cannot Afford Is Not a Permissible Exercise of the Police Power.

A. A Classification Based Upon Economic Discrimination is Disfavored and Must be Both Necessary and Reasonably Related to the Objectives Sought.

A state may make distinctions among its citizens. At a minimum, however, any classification must be rationally related to the attainment of a legitimate objective of government action. See, e.g., *Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573, 578 (1968). More importantly, where the state's classification is based on certain suspect criteria or affects rights deemed particularly important mere rational relationship between the classification and the end sought will not justify the discrimination. A showing that the classification is *necessary* to promote a compelling governmental interest is then required. *Shapiro* v. *Thompson*, —— U.S. ——, 37 U.S.L.W. 4334, 4338 (1969). The economic discrimination effected by the statute in question fails either test.

This Court has placed discrimination among citizens on the basis of wealth in the same "traditionally disfavored" category as discrimination on the basis of race or color. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 669 (1966). State laws involving racial discrimination have been held to be " 'constitutionally suspect' . . . and subject to the 'most rigid scrutiny' . . . and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose. . . ." *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964).

A law which discriminates on the basis of poverty should be equally disfavored. Like a racial classification,

> "Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, . . . *and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.*" *McLaughlin* v. *Florida*, *supra* at 196. (Emphasis supplied.)

Treating discrimination against poor citizens the same as discrimination against black citizens is in keeping with the highest purposes of the equal protection clause, as stated in *Hernandez* v. *Texas*, 347 U.S. 475 (1954):

> "Through our history differences in races and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

This Court has said:

> "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, *Harper* v. *Virginia Board of Elections*, *supra*, two factors which would independently render

> a classification highly suspect and thereby demand more exacting judicial scrutiny." *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802 (1969), 22 L. Ed. 2d at 744.

The effect, in constitutional terms, of a holding that a classification is based on a suspect criterion, like wealth, or affects a fundamental citizen interest, like access to the courts, is invalidation of the statutory classification, unless its *necessity* to achieve a *compelling* governmental interest is clear. *Developments in the Law: Equal Protection,* 82 Harv. L. Rev. 1065, 1101, 1121 (March 1969). The statute involved here may have several purposes: raising revenue, discouraging frivolous litigation, protecting the family unit from divorce. Its purpose may be all of these or none. The Appellants here do not question the ligitimacy of such objectives.

But the state must show that its interest is of such a magnitude as to preclude all law suits by those too poor to pay the necessary court and service expenses. It must show, too, that requiring these fees as a prerequisite to suit is *necessary* to achievement of the State's purposes. If no such showing is made, Connecticut may not bar the poor from its courts.

This approach, similar to the concept of overbreadth employed in First Amendment cases, is traditional when this Court views classifications drawn on suspect lines or which impair some fundamental interest. See, e.g., *McLaughlin* v. *Florida, supra; Carrington* v. *Rash,* 380 U.S. 89 (1965).

> "Thus, the cases indicate that when a fundamental interest is impaired or a suspect distinction drawn,

the Court will demand a *convincing demonstration* that the classification is well tailored to achieve the statutory objective. . . . The State must show at least that this classification is *more than just one of several reasonable ways* of achieving its goals." *Developments in The Law: Equal Protection, supra* at 1122. (Emphasis supplied.)

Even applying the less stringent "rational relationship" test to the statute here may compel the conclusion that the statute must fall. One of the basic requisites for a valid classification is that it must include all and only those persons similarly situated with respect to the purpose of the law. See Tussman and tenBroek, *The Equal Protection of the Laws,* 37 Calif. L. Rev. 341, 346 (1949). An over-inclusive classification is not permitted by the equal protection clause.

> "[L]egislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" *Rinaldi* v. *Yeager,* 384 U.S. 305, 309 (1966).

In *Rinaldi* this Court invalidated a New Jersey statute requiring incarcerated defendants to reimburse the state, out of their prison pay, for the cost of transcripts provided in connection with their unsuccessful appeals. Though collection from some Appellants defrayed the state's costs and, therefore, fulfilled the law's purpose, the *classification* of Appellants into those incarcerated and those fined or

on probation was not reasonable. Therefore, concluded the Court:

> "There is no defensible interest served by focusing on that distinction as a classifying feature in a reimbursement statute, since it bears no relationship whatever to the purpose of the repayment provision." *Ibid.*

Thus, the requirement of the court costs must meet two tests. The first is that the statute must be reasonably related to the objectives sought. Secondly, because the statute involves a disfavored mode of classification—that of wealth—it must be *necessary* to the ends intended. If there are other means of achieving those ends, the statute is void.

B. There Is No Necessity or Rational Basis for Barring Litigation by the Poor.

The requirement of filing fees denies due process and equal protection of the laws to plaintiffs. Yet, it may be argued, such a requirement is justified by necessity.

There is no substance to that argument.

Perhaps it will be contended that filing fees are necessary to discourage litigation. If so, the impact must surely fall exclusively on the poor. The wealthy would not be deterred by legal fees of under one hundred dollars. Thus, the result is to eliminate only the litigation of the poor, without regard to the merit of that litigation, while even the most frivolous suit may be filed by a wealthy person. Yet there is no rational basis for assuming that an indigent's suit will be less meritorious than that of a wealthy person. See *Griffin* v. *Illinois,* 351 U.S. 12, 17-18 (1956); *Burns* v. *Ohio,*

360 U.S. 252, 257-258 (1959); and *Smith* v. *Bennett,* 365 U.S. 708, 710 (1961).

If, indeed, the intent is to eliminate frivolous suits, there are other means of accomplishing that goal. The state might require—as Connecticut in fact does—that significant actions be initiated by a pleading signed by a Commissioner of the Superior Court or Clerk of court. Again, abuse of process could be made a tort, as it now is in Connecticut. See Wright, *The Connecticut Law of Torts,* 220-224 (1956). Or verifications under oath could be required in all actions, with contempt punishments for false statements. Any of these devices could be employed to eliminate frivolous litigation, without simultaneously excluding the poor from the courts.

It may well be that enabling the poor to sue without payment of fees will increase litigation. But this is only saying that acknowledging a right may lead to its exercise; hardly a surprising result. The potential impact is, of course, wholly speculative. Even if it is substantial, still, clearly substantial consequences did not deter the Court in *Gideon* v. *Wainwright, supra,* and there is no reason to adopt a different attitude here. A contrary approach would require a Court to weigh unmeasurable and imponderable financial and systemic variables in every case involving Constitutional issues. See *Discrimination Against the Poor and the Fourteenth Amendment,* 81 Harv. L. Rev. 435, 441 (1967). This would be an untenable approach to constitutional interpretation.

Of course, the argument may be that court fees are required to produce revenue. This may be doubted, since the revenue produced is only a small fraction of the cost of

the judicial system. Appellants have been advised* that the total appropriations for the Connecticut judicial department are approximately fifteen million dollars and that revenue from filing fees totalled about one-tenth of that, or one million five hundred thousand dollars. The District Court's finding, at 286 F. Supp. 973, that perhaps one-fifth of the cost of Connecticut's court system is produced by fees lacks foundation in the record. No evidence was offered as to this issue. In fact, the relevant statistic is not how much revenue is now generated by fees, but how many cases *might* be prosecuted without fees.

Further doubt is cast upon the necessity for court fees by the fact that some twenty-three jurisdictions and the federal courts provide for waiver of fees on behalf of indigents, thus foregoing potential revenue. See: *Public Provision for Costs and Expenses of Civil Litigation*, American Bar Foundation (1966), p. 11. This exhaustive study contrasts (at pp. 24-25) the court system of fees with the approach in administrative tribunals, where most costs of proceedings are borne by the government. The study notes (pp. 2-3) that:

> "Although fees charged to litigants do not produce nearly enough revenues to operate the federal and state courts, such fees and auxiliary charges are so high as to constitute a substantial deterrent to the poor litigant if he must pay these expenses himself."

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* See Exhibit #1, attached to this Brief, containing a portion of a report by the Chief Administrator of the Connecticut Courts and a letter from the Executive Secretary of the Connecticut Judicial Department.

It is not here contended that all civil actions must be *in forma pauperis* where an indigent is involved. Rather, such an approach is required only in matters of fundamental import. Marital relationships may be thus characterized. So also, home and residence, child custody and livelihood are similarly basic. But matters of personal pique or gain are of lesser degree. While the distinction is not wholly clear, it is not unlike that involved in applying the principles of *Gideon* v. *Wainwright, supra,* to determine when criminal defendants are entitled to appointment of counsel. See: *Discrimination Against the Poor and the Fourteenth Amendment,* 81 Harv. L. Rev. 435, 450-451 (1967) and *The Indigent's Right to Counsel in a Civil Case,* 76 Yale L.J. 545, 558 (1967).

So also, the contentions here do not lead logically to an argument for appointment of counsel or provisions of experts in civil cases. Here, the Appellants are simply asking that Connecticut terminate an unlawful practice. There is no demand that the State develop a new system for affording new services. Appellants' position is that, once in court, there is an opportunity to be heard even without experts or counsel; but that without the relief sought here, there is no way even to get into court. See *Right to Civil Counsel,* 66 Col. L. Rev. 1323 (1966), and *Burns* v. *Ohio,* 360 U.S. 252, 258 (1959).

C. Barring Divorce Actions Has Destructive Consequences Upon the Family Units of the Poor.

It may be contended that the policy of requiring fees is designed to discourage divorce and save the family unit. Such an argument is strangely inconsistent with Connecti-

cut's public policy of allowing divorces. This argument also ignores the fact that the fee requirement applies to all litigation, not just divorce. (See the Opinion below, 286 F. Supp. 974, f. 6.) Too, it ignores the disastrous consequences of denying divorce to the poor. And yet those consequences are well documented.

The rate of divorce is lowest among the unskilled portions of our society. Goode, *After Divorce,* Free Press (Glencoe, 1956), pp. 46-47. This may be attributed in part to the expense of divorce proceedings. Weeks, *Differential Divorce Rates By Occupation* 21 Social Forces, at p. 334 (1943); W. A. Lutz, "Marital Incompatibility," in Cohen, *Social Work and Social Problems* (1964). Similarly, Negroes have a disproportionately high rate of desertion, rather than divorce, apparently due—in part—to the high expense of divorce proceedings. See, e.g., Goode, *After Divorce, supra,* at p. 51; Mercer, *Interrelations Among Family Stability, Family Composition, Residence and Race* 29 J. Marriage and the Family, 456-460 (1967); and Cavan, *The American Family* (3d Ed., Crowell Co. 1963), at pp. 431-432:

> "According to several studies, the unskilled have rates lower than the semi-skilled, a fact that may be accounted for by the expense of divorce, religious affiliation or lack of property that would necessitate a legal settlement. . . . Non whites, whose income tends to be much lower than that of whites, find it less troublesome and less expensive to separate than to divorce.

If the poor and Negroes are barred from divorce, then they are left only with a choice to separate or live together in unhappiness. The consequences of the latter are worse

than divorce, at least on the children. Nye, *Child Adjustment in Broken and In Unhappy, Unbroken Homes* 19 Marriage and Family Living, pp. 356-61 (1957); Landis, *A Comparison of Children from Divorced and Non-Divorced Unhappy Marriages,* Family Life Coordinator, pp. 61-5 (July, 1962). Studies indicate that children from broken homes are often better adjusted than those from unbroken yet unhappy homes. See Burchinal, *Characteristics of Adolescents,* J. of Marriage and Family, p. 44 (Feb. 1964).

Consequently, separation is frequently chosen where divorce is actually needed but economically unavailable.

Yet separation has a far more deleterious effect on the family than divorce. The result of separation may be a series of shifting, unstable desertions, reunions, and extra marital alliances, as noted by *Cavan, supra,* at p. 151:

> "The very fact that after a separation the marriage may be resumed without formality adds to the instability. One separation may follow another, often being in the nature of desertion by the father who moves out, leaving the mother and children without support. With longer periods of separation, but no legal termination of the marriage through divorce, temporary alliances or more permanent common-law marriages may replace legal marriage."

This is discussed at length in Rephart, *The Family, Society and The Individual,* pp. 596-7 (2d Ed., Houghton Mifflin, 1966). The economic consequences of the wife and the emotional consequences on the children of desertion are severe, while those of divorce may be less deep and perma-

nent. See, e.g., Plant, *The Psychiatrist Views Children of Divorced Parents,* 10 Law and Contemporary Prob. 807 (1944). Particularly is this so since divorce offers the prospect—and statistical reality—of a better life through remarriage.

There is little statistical likelihood that a shattered marriage or a deserted family among the poor and Negroes can be restored. Rephart, *ibid.* This is especially true where the deserted mother is being supported by welfare assistance: Harper and Skulnick, *Problems of the Family,* p. 290 (Bobbs-Merrill, 1962). But the likelihood of remarriage after a divorce is great: some two-thirds enter a second marriage. Rephart, *supra,* at 609-610; see also, Jacobson, *American Marriage and Divorce,* p. 82 (Reinhart, 1959). And the prospects of success in the second marriage are at least favorable, if not excellent. Goode, *supra,* at p. 335; Bernard, *Remarriage, A Study of Marriage,* at p. 269 (Dryden Press, 1956); Lutz, *supra,* at pp. 61-2.

Remarriage may introduce economic stability to the home. More importantly, it brings in a father for the children. The effect of the absence of a father in a home has been clearly described in the "Moynihan Report," and is a particularly acute problem with Negro homes: *The Negro Family: The Case for National Action,* Moynihan (1965). It seems clear that both Negro mothers and children fare better emotionally and educationally with the presence of a father in the household. Lystad, *Family Patterns, Achievements and Aspirations of Urban Negroes,* 45 Sociology and Social Research, pp. 281-288 (1961); Parker and Kleiner, *Characteristics of Negro Mothers in Single-*

Headed Households, 28 J. Marriage and the Family, 507 (1966).

Further support for the preceding discussion may be found in a current book, Steinzor, *When Parents Divorce,* and several articles: Monahan, *When Married Couples Part,* 27 Am. Soc. Rev. 625 (1962); Locke & Klausner, *Marital Adjustment of Divorced Persons,* 33 Soc. and Soc. Research 97 (1948); and Locke, *Predicting Marital Adjustment by Comparing A Divorced And A Happily Married Group,* 12 Amer. Soc. Rev. 187 (1947).

This is not to suggest that the literature of sociology is conclusive. Nor is it to suggest that these Appellants will certainly find happiness if they obtain divorces. However, it does seem clear that Connecticut's policy of barring indigents from divorce does not save marriages. Rather, that policy leads to unstable homes, racked by desertion, emotional upset and financial distress. Such a policy is not consistent with due process of law.

VI.

The Relief Sought by Appellants Could Properly Have Been Rendered by the Court Below.

Appellants' prayer for relief asked the Court below to do three things. The first was to convene a three judge court to hear the case. This was done. The second was to declare unconstitutional the statute which requires indigents to pay court costs before they may sue for divorce in Connecticut. And the third was to compel the defendants to:

"(a) Accept for filing, without payment of fees and costs, the papers attached as Exhibit A [i.e., the divorced papers];

(b) Permit the named plaintiffs to proceed with their divorce actions without payment of fees and costs;

(c) Effect all necessary service and notice incident to the divorce actions without payment of fees and costs by the named plaintiffs;

(d) Take similar action with respect to future divorce proceedings initiated by other members of the class represented by the named plaintiffs."

The second and third prayers were not granted.

The reasons for the District Court's denial are not clear. The District Court distinguished the *Griffin* line of cases, discussed *supra*, III.A., by noting that there are "differences" between the right to freedom and the right to access to the court. 286 F. Supp. 972, 973. But, as noted earlier, these differences are superficial and hardly of constitutional moment. See dissent, *Williams* v. *Schaffer*, 385 U.S. 1037 (1967). The implication of *Griffin* for this case is clear.

The District Court went on to consider whether the State has a legitimate basis for imposing court fees. It found two. One was "providing financial support for the court establishment." But there is no basis whatsoever in the record for finding that such support is significant. Appellants have been advised* that revenue from filing fees is less than one-tenth of the total appropriated for the judi-

* See Exhibit #1, Attached.

cial department. In any event, the relevant statistic is not how many fees are now paid but how many cases might be prosecuted without fee if Appellants prevail. This, of course, is a matter of speculation. In any event, it hardly makes sense to impose financial requirements to raise revenue from the poor when they will be unable to pay the fees.

The second basis found by the District Court for justifying imposition of a fee system upon the poor was "discouraging resort to litigation in purely frivolous matters, which might more often be filed by indigent and affluent alike if the service were entirely free from cost." 286 F. Supp. 973. But this misses the point. Appellants did not seek total abandonment of the fee system. The fault in such a system is that it totally bars the poor from the courts, whether their litigation has merit or not. Eliminating this fault, at worst, would only permit frivolous litigation by the poor, while at the same time permitting them to bring meritorious litigation. The State, of course, would remain free to employ other means to preclude frivolous litigation.

Thus, the District Court's concern for the rationale of the fee system was not a proper basis for denying the relief sought by Appellants. The real reason apparently was that the District Court felt the issue posed by this case was an intractable problem, fit only for political solution. The Court below therefore hesitated to act "until the ordinary political processes have an opportunity to function in normal course." 286 F. Supp. 973.

Whether this abstention was proper or not is no longer material. The Connecticut legislature (as noted at p. 4 of BRIEF OF APPELLEES RE MOTION TO AFFIRM, filed in this Court) considered at the session which ended in

June, 1969 three separate bills which would have granted the relief Appellants seek. All three were defeated. Thus, the District Court's reliance upon the "normal course" was misguided.

Equally misguided was its conclusion that the problems posed by this suit are not susceptible of judicial resolution. The District Court said (286 F. Supp. 973):

> "Militating against striking down the present fee legislation by judicial fiat is the extreme difficulty of judicial determinaiton of the course the state should be required to follow."

The Court was concerned that determining the source from which funds should come and the expenses they should embrace were questions suitable for legislative resolution.

The Court thereby drifted into matters irrelevant to the controversy before it. Where the money would come from and what it would embrace were not the issues for resolution by the District Court. It had only to act upon Appellants' prayer for relief. It had only to determine that the State was improperly barring Appellants from its courts and order the State to remedy this situation. The State would then be free to select the remedy.

Instead, the Court below conjured up a host of problems and then concluded they were difficult of solution. So much may be conceded. But this does not justify the conclusion of the court below that the judiciary is therefore unable to grant relief. It is probably true that every constitutional case raises problems which might be resolved by legislation. Yet courts do not therefore abandon the Constitution. This seems so self evident as not to require authority,

although a brief reference may perhaps be appropriate to *Gideon* v. *Wainwright,* 372 U.S. 335 (1963) and *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

The practical problems of granting relief here are readily soluble. The state courts need only file Appellants' papers without fees and arrange service. It is that simple. If the State wishes to devise more complex solutions, it is free to do so, but not as a basis for denying a legitimate constitutional claim. And if the State is confronted with practical problems, they may be attributed to the State's own inaction; inaction which denies Appellants' constitutional rights.

But the practical problems of granting relief are negligible here when compared with other cases which have been before this Court. *Gideon* v. *Wainwright, supra,* had enormous consequences for the criminal processes of every state in this nation. Yet Gideon was not denied relief. The one-man-one-vote rule of *Baker* v. *Carr,* 369 U.S. 186 (1962) restructured the political fabric of the state and local government in this country. But this court nevertheless granted relief which was clearly right. And the decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954) reworked the social order of this nation in such a far-reaching manner that its implications may never be fully realized. The practical problems posed by this present suit are simply not of the magnitude of these earlier cases.

Yet the constitutional issues raised by Appellants are equal in importance to those involved in *Brown, Gideon* and *Baker* v. *Carr, supra.* It is strangely inconsistent for the District Court to contend that these issues are so difficult as to defy judicial resolution and yet, at the same time,

conclude that they are inconsequential and not of constitutional dimension. The simple fact is that this case tests one of the basic promises of our Constitution. The Fourteenth Amendment guarantees equal protection and due process for "all." Appellants maintain that "all" includes even those indigent litigants who are barred from state courts by reason of poverty. If this view is correct, Appellants must prevail.

Nothing could be more fundamental, clear and appropriate for judicial resolution.

Conclusion

This case is wholly susceptible of judicial resolution. While the Connecticut legislature could also act to provide the relief Appellants seek, it has chosen not to do so. Connecticut's courts remain closed to the poor.

The Sovereign covenanted centures ago in the Magna Charta not to sell justice. This Court acknowledged that pledge two decades ago in *Griffin* v. *Illinois*. It is time now to extend simple justice to Gladys Boddie and her co-Appellants.

Respectfully submitted,

ARTHUR B. LAFRANCE, Esq.
Attorney for Appellants
College of Law
Arizona State University
Tempe, Arizona 85281

Certificate of Service

I, ARTHUR B. LAFRANCE, attorney for the plaintiffs, depose and say that on the 1st day of August, 1969, I served a copy of the foregoing Brief on the defendants by mailing copies first class postage prepaid to the following attorneys of record:

Robert K. Killian, Raymond J. Cannon,
Edward J. Peters, 30 Trinity Street,
Hartford, Connecticut.

/s/ ARTHUR B. LAFRANCE

Sworn to and subscribed before me, this 1st day of August, 1969.

KATHRYN PARKER JOHNSON
Notary Public
My Commission Expires Oct. 30, 1971

(Seal)

EXHIBIT 1

Report of
John P. Cotter
Justice, Supreme Court
Chief Court Administrator

Hartford, Connecticut
March 1969

GENERAL STATUTES § 51-2.

"There shall be a chief court administrator who shall, upon nomination of the governor, be appointed by the general assembly from among the judges of the supreme court . . . The chief court administrator shall be the administrative director of the judicial department and responsible for the efficient operation thereof and of its constituent courts . . . and for the expeditious dispatch of litigation therein and the proper conduct of the business of said courts."

APPENDIX C

FISCAL STATISTICS OF JUDICIAL DEPARTMENT

Fiscal Year	Appropriations	Expenditures	Revenues*	Collections**
1957-1958	$ 4,413,959	$ 4,409,744	$1,014,364	$ 921,788
1958-1959	4,863,499	4,640,440	1,060,712	1,110,415
1959-1960	4,968,320	4,931,610	1,249,738	1,785,944
1960-1961	8,093,283	6,903,048	1,252,523	2,389,971
1961-1962	9,163,915	8,726,328	1,177,318	3,415,994
1962-1963***	9,522,111	9,307,004	4,544,061***	7,464,306***
1963-1964	9,888,089	9,728,250	4,662,664	9,240,157
1964-1965	10,262,689	10,257,612	5,197,607	11,582,857
1965-1966	12,508,302	12,466,373	5,950,454	13,813,596
1966-1967	14,633,061	13,745,493	6,216,264	15,847,850
1967-1968	15,614,618	15,571,378	6,505,636	18,387,383

*Money deposited to the general fund received from court fees, fines, and forfeitures.

**Money collected by various divisions of the court, principally the family relations division of the Superior Court, domestic relations division of the Circuit Court, and the Bureau of Support, and transmitted to either the Welfare Dept. or some other beneficiary of the court order.

***Commencing this year, the reported figures reflect the full impact of the new Circuit Court system.

STATE OF CONNECTICUT
JUDICIAL DEPARTMENT

JOSEPH J. KEEFE
EXECUTIVE SECRETARY

July 24, 1969

P. O. ADDRESS
BOX 1559, HARTFORD, CONN. 06101

John R. Williams, Esq.
New Haven Legal Assistant Association, Inc.
Legal Aid Bureau
169 Church Street
New Haven, Connecticut 06510

Dear Mr. Williams,

The following chart depicts revenue received from entry fees in the Supreme Court, the Superior Court, and the Court of Common Pleas, and revenue received from fees (including the entry fee, copy fees, etc.) in the Circuit Court for fiscal 64-65 through fiscal 67-68.

	Supreme	Superior	Common Plea	Circuit
64-65	$ 4,620	$324,595	$133,120	$498,985.10
65-66	5,544	324,566	148,020	528,171.19
66-67	5,016	344,835	144,240	591,066.82
67-68	10,575	704,180	208,250	635,931.20

Since the Circuit Court reports revenue in four categories, namely, motor vehicle, criminal, civil, and parking, and does not break down the fees received under the category "civil", the figures listed above for the Circuit Court necessarily include not only revenue from entry fees but also for all other fees received in civil cases. Since 42,796 civil cases ($7 entry fee) and 57,509 small claims ($3 entry fee) were returned to the Circuit Court in 67-68, my mathematics tell me that of the $635,931.20 received for civil fees $472,099 was received for entry fees.

Sincerely,

Joseph J. Keefe

Executive Secretary

JJK:jr

cc: Mr. Edward Criscuolo
Mr. John J. Nachyly